SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 700

UNITED STATES, APPELLANT

vs.

BERNARD MERSKY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

	Original	Print
Proceedings in the U.S.C.A. for the Second Circuit		1
Appendix to brief of appellant consisting of record from the United States District Court for the Southern District of New York	A	1
Docket entries	1a	1
Information C 155–43	3a	2
Notice of motion to dismiss the information and/or other relief	8a	6
Affidavit of Julius L. Schapira	10a	7
Opinion, Noonan, J.	12a	9
Notice of appeal from decision	16a	11
Notice of settlement and order	18a	12
Notice of appeal from order	20a	14
Opinion, Lumbard, J.	22a	15
Judgment	29a	20
Memorandum for the United States with respect to certification of the appeal to the Supreme Court	31a	20
Order re certification	36a	23
Clerk's certificate	38a	24
Order postponing jurisdiction	39a	25

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A In United States Court of Appeals for the Second Circuit

No. 25193

UNITED STATES OF AMERICA, APPELLANT

against

BERNARD MERSKY, IRVING WEINSTEIN, AND MERSON MUSICAL PRODUCTS CORP., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF NEW YORK

Appendix to brief of appellant

Filed August 4, 1958

[File endorsement omitted.]

1a (A)

In the United States District Court

For the Southern District of New York, Criminal Docket

Crim. No. Cr. 155–43

THE UNITED STATES

v.

BERNARD MERSKY, IRVING WEINSTEIN, MERSON MUSICAL PRODUCTS CORP.

VIOLATION: Title 19, Sec. 1304 and Title 18, Sec. 371 USC. Unlawfully obliterating labels on violins imported from Soviet Zone of Germany and conspiracy. 11 counts.

Docket entries

Date 1958		*Proceedings*
Feb.	5	Filed information.
"	7	Filed notice of appearance for all defendants by Julius Schapira, Atty. 342 Madison Ave. NYC.
2a Feb.	11	Bernard Mersky—Pleads not guilty—Released on own recognizance. Irving Weinstein—Pleads not guilty—Released on own recognizance. Merson Musical Products Corporation—Pleads not guilty—by Bernard Mersky, President. Weinfeld, *J.*

Date 1958	Proceedings
Feb. 19	Filed affidavit and notice of motion as to all defts for an order dismissing the indictment; to permit defts to inspect and photograph the violins; for a bill of particulars.
Mar. 10	Motions filed 2-19-58 argued. Decisions reserved. Noonan, *J.*
April 30 (B)	Filed Notice of Appeal by the Government.
Mar. 26	Filed opinion #24207 by Judge Noonan. Motion to dismiss information against all defendants—Granted. Settle Order. Noonan, *J.*
April 24	Filed Notice of Appeal on behalf of the Government.
" 29	Filed notice of settlement and order dismissing information.
May 1	Filed Transcript of record of proceedings, dated 2/11/58. Noonan, *J.* (mailed notice).

A true copy.

[SEAL]

ROBERT A. CHARLESON,
Clerk.

By RAOUL BRUGO,
County Clerk.

3a In United States District Court, Southern District of New York

[Same title.]

Information C 155-43

Filed February 5, 1958

The United States Attorney charges:

1. From on or about the 3rd day of August, 1956, up to and including the 22nd day of March, 1957, in the Southern District of New York, Bernard Mersky, Irving Weinstein and Merson Musical Products Corporation, the defendants, unlawfully, wilfully and knowingly, and with intent to conceal the information contained thereon, did obliterate, remove and cover, and caused to be obliterated, removed and covered, certain country of origin marks, namely, labels bearing the inscription, "Germany /USSR Occupied", which labels were attached, to certain violins, hereinafter described, that were manufac-

tured and produced in the Soviet Zone of Germany, when the said violins were imported into the United States, and which labels were obliterated, removed and covered, and caused so to be, by the defendants prior to sale of the said violins to an ultimate purchaser in the United States.

4a 2. The allegations contained in paragraph "1" above are realleged for Counts 1 through 10 inclusive:

Count	*Violins on which the attached country of origin marks were obliterated, removed and covered*
1	Violin bearing Merson serial no. 4234.
2	Violin bearing Merson serial no. 4236.
3	Violin bearing Merson serial no. 4237.
4	Violin bearing Merson serial no. 4239.
5	Violin bearing Merson serial no. 4241.
6	Violin bearing Merson serial no. 4254.
7	Violin bearing Merson serial no. 4467.
8	One of three ¾ size plywood violins, sold by defendants on or about March 22, 1957.
9	One of three ¾ size plywood violins, sold by defendants on or about March 22, 1957.
10	One of three ¾ size plywood violins, sold by defendants on or about March 22, 1957.

(Title 19, United States Code, Section 1304.)

5a The United States Attorney further charges:

ELEVENTH COUNT

1. From on or about the 3rd day of August, 1956, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, Bernard Mersky, Irving Weinstein and Merson Musical Products Corporation, the defendants, and divers others to the United States Attorney unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate Title 19, Section 1304, United States Code, and the regulations promulgated thereunder.

2. It was a part of the said conspiracy that the said defendants unlawfully, wilfully and knowingly and with intent to conceal the information contained thereon, would obliterate, remove and cover, and cause to be obliterated, removed, and covered, certain country of origin marks, namely, labels bearing the inscription, "Germany/USSR Occupied", which labels were attached to certain violins that were manufactured and produced in the Soviet Zone of Germany when the said violins were imported into the United States, and which labels would be obliterated, removed and covered, and caused so to be, by the defendants prior to the sale of the said violins to an ultimate purchaser in the United States.

3. It was further a part of the said conspiracy that the said defendants unlawfully, wilfully and knowingly, and with intent to conceal the information contained on the aforesaid country of origin marks would sell the aforesaid violins to purchasers in the United States without indicating to such purchasers the true country of origin of the violins.

6a

4. At all the times mentioned herein Merson Musical Products Corporation was a corporation incorporated in and doing business in the State of New York, Bernard Mersky was the president of the said corporation, and Irving Weinstein was the secretary of the said corporation.

OVERT ACTS

1. In pursuance of the said conspiracy and to effect the objects thereof, on or about the 3rd day of August, 1956, in

8a In United States District Court, Southern District of New York

[Same title.]

Notice of motion to dismiss the information and/or other relief

Filed Feb. 19, 1958

SIR: Please take notice that, upon the annexed affidavit of Julius L. Schapira, sworn to the 19th day of February, 1958, The Information and the pleadings and proceedings had herein, the undersigned attorney for the defendants will move this Court at Criminal Motions Part, Room 318, United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 24th day of February, 1958, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard for an order:

1. Dismissing the Information on the ground that it does not state facts sufficient to constitute an offense against The United States.

2. Requiring the United States Attorney, pursuant to Rule 16, to permit the defendants to inspect and/or photograph the violins mentioned in Counts 1 through 10.

3. Requiring the United States Attorney to furnish the defendants with the following particulars:

(a) The name or names of the importers of the violins from which the defendants allegedly removed the labels.

9a (b) The names of the persons who placed the labels on the violins which were allegedly removed by the defendants.

(c) What part did each defendant play in the alleged removal of the labels?

(d) Is it claimed by the government that the defendants sold the violins to ultimate purchasers? If not, who did?

(e) Do the violins bear any markings indicating the country where it was manufactured or from where they were imported? If so, state the conntry.

(f) Is it claimed by the government that the defendants sold imported violins without indicating their country of origin?

11a political entity known as a nation" (Section 304, Tariff Act of 1930—Customs Reg. 118). The defendants considered all of Germany as one nation and marked the violins imported from Germany as "made in Germany".

The government, presumably, relies on T.D. 53210(1953) which states that the Soviet sector of Germany is to be considered as a separate "country of origin". But, it is respectfully submitted that that decision was made "For the purpose of the value provisions of Section 402, Tariff Act of 1930", etc., and not to change the criminal sanctions.

It is elementary that penal provisions must be strictly construed in favor of the accused.

There is no clear-cut regulation which makes it a violation to mark an article imported from East Germany "made in Germany" except in connection with tariff status and customs valuation. Obviously, this is not the case here.

Accordingly, it is respectfully submitted that the Information should be dismissed.

In any event, the defendants should be afforded an opportunity to inspect the violins identified in Counts 1 (11) through 10 which are in the possession of the United States Attorney, to enable them to adequately prepare for trial. For the same purpose, the defendants should be given the particulars requested. It is not clear whether the individual defendants are charged with actual participation in the alleged removal of the labels or are they charged merely because they are officers of the defendant corporation.

Wherefore, I respectfully pray that the relief requested in the Notice of Motion herein be granted.

JULIUS L. SCHAPIRA.

(Sworn to February 19, 1958.)

12a

MEMORANDUM

United States District Court, Southern District of New York
New York

C 155–43

[Same title.]

Opinion of United States District Judge Gregory F. Noonan

March 26, 1958

NOONAN, *D.J.*

The defendants herein have moved:

(1) to dismiss the information against them on the ground that it does not state facts sufficient to constitute an offense against the United States.

(2) to permit the defendants to inspect and/or photograph the violins mentioned in that information; and

(3) for a Bill of Particulars.

Since dismissal of the information would obviate the need for determination of the latter two points, we turn directly to that subject.

The first ten counts of the information charge the defendants with violations of Title 19 U.S.C. Sec. 1304; the remaining count charges them with conspiracy to violate that section. The statute involved is known as the Tariff Act of 1930 (as amended).

13a The pertinent portions of that section of Title 19 (Customs Duties) read as follows:

"* * * every article of foreign origin * * * imported into the United States shall be marked * * * in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article."

The section then goes on to authorize the Secretary of the Treasury to issue regulations determining the wording of the mark required, and concludes with a penal provision for altering any mark required by the Act.

Pursuant to that authority, the Secretary promulgated certain regulations.

The defendants contend that they have not violated the statute because the violins were marked "Made in Germany". The government contends that they should have been marked "Germany/USSR Occupied", or some other marking designed

to indicate that the violins were from Eastern as distinguished from Western Germany.

19 C.F.R. Sec. 11.8, dealing with marking recites in part:

"(a) The term 'country' as used in Sec. 304, Tariff Act of 1930, as amended, requiring the marking of Articles to indicate the Country of origin, shall be considered to mean the political entity known as a nation. Colonies, possessions or protectorates, outside the boundaries of the mother country shall be considered separate countries * * *".

14a In addition thereto the Secretary of the Treasury issued on August 28, 1946, Treasury Decision #51527 which began as follows:

"For the purposes of the marking provisions of the Tariff Act of 1930, as amended, Germany shall be considered the country of origin of articles manufactured or produced in all parts of the German area subject to the authority of the Allied Control Commission and the United States, British, Soviet and French Zone Commanders, regardless of the country from which exported."

The Treasury decision then goes on to cover certain matters not material to this issue, and then concludes:

"The use of additional words to indicate the particular zone of origin, for example, 'Made in Germany-U.S. Zone,' is permissible."

The government relies on two subsequently issued Treasury Decisions ##53210 and 53281.

Treasury Decision #53210 provides that "For the purposes of the value provisions of section 402, Tariff Act of 1930, as amended (19 U.S.C. 1402)", articles from Western Germany should still be marked as made in Germany, but articles from Eastern Germany should be marked to indicate "Germany [Soviet occupied]".

Treasury Decision #53281 provides alternate markings to that mentioned in #53210.

The purpose of markings pursuant to 19 U.S.C. Sec. 1304 is to enable the ultimate purchaser to know where the
15a goods were produced and to be able to buy or refuse to buy if such marking influences his will. U.S. v. Friedlaender & Co., 27 C.C.P.A. 297.

Certainly in these days, the indication of which part of Germany originated the violins might well influence the determination of the ultimate buyer.

Nonetheless, it is the opinion of this court from a reading of the Treasury Decisions # #53210 and 53281, in their entirety, that such Treasury Decisions appear to have been issued primarily to establish markings for purposes of the differences in the duties applicable to articles from the two parts of Germany and, while it appears to this court that it is not unreasonable to view those Treasury Decisions as indicating that such distinction should be complied with for all purposes, the court does not believe that such intent is manifested in a manner sufficiently clear and unambiguous to justify a criminal prosecution thereon.

As the defendants note, the Secretary could very easily have indicated that East and West Germany should be considered two separate countries for all purposes within the jurisdiction of the Treasury Department, not just for the purposes of the value provisions of Sec. 402.

Since penal provisions are to be very narrowly construed, and since the court believes that ambiguity exists in the Secretary's regulations, such ambiguity must be construed in favor of the defendants.

Accordingly, it is the decision of this court that the information against the defendants should be dismissed.

Settle order.

Dated, New York, N.Y., March 26, 1958.

G. NOONAN,
U.S.D.J.

16a In United States District Court, Southern District of New York

C 155–43

UNITED STATES OF AMERICA, APPELLANT

against

BERNARD MERSKY, IRVING WEINSTEIN AND MERSON MUSICAL PRODUCTS CORP., APPELLEES

Notice of appeal from decision

SIR:

NAME OF APPELLANT: United States of America.

NAME AND ADDRESS OF APPELLENT'S ATTORNEY: Paul W. Williams, United States Attorney for the Southern District

of New York, United States Court House, Foley Square, Borough of Manhattan [7], City of New York.

OFFENSE: Removing country of origin labels from articles imported into the United States, Title 19, United States Code, Section 1304, and conspiring so to do, Title 18, United States Code, Section 371.

17a DECISION OF THE COURT: Decision of Honorable Gregory F. Noonan entered in the Southern District of New York on March 26, 1958, granting a motion to dismiss Information C 155–43 on the (19) ground that the Treasury Regulations promulgated under Title 19, United States Code, Section 1304, are not sufficiently clear and unambiguous as to justify criminal prosecution thereon.

The above-named appellant hereby appeals to the United States Court of Appeals for the Second Circuit from the above-stated decision.

Dated: New York, N.Y., April 23, 1958.

Yours, etc.,

Paul W. Williams,
PAUL W. WILLIAMS,
United States Attorney for the Southern District of New York, Attorney for Appellant, Office and Post Office Address: United States Court House, Foley Square, Borough of Manhattan [7], *City of New York.*

To: JULIUS L. SCHAPIRA, Esq.,
Attorney for Appellees,
342 Madison Avenue, New York 17, N.Y.

18a United States District Court, Southern District of New York

NOTICE OF SETTLEMENT

Notice of settlement and order

Filed April 29, 1958

SIR: Please take notice that the within Order will be presented for settlement and signature to the Clerk of the United States District Court at his office in the United States Court House, Foley Square, Borough of Manhattan, City of New

York, on the 28th day of April, 1958, at 11:00 o'clock in the forenoon or as soon thereafter as counsel can be heard.

Dated: New York, N.Y.

Yours, etc.,

Paul W. Williams,
PAUL W. WILLIAMS,
United States Attorney for the Southern District of New York, Attorney for Plaintiff, U.S.A., Office and Post Office Address: United States Court House, Foley Square, Borough of Manhattan [7], City of New York.

19a To: JULIUS L. SCHAPIRA, Esq.,
Attorney for Defendants,
342 Madison Avenue, New York 17, N.Y.

In United States District Court, Southern District of New York

[Same title.]

Order granting motion to dismiss information

April 29, 1958

Upon the oral argument and papers submitted thereon, this Court having handed down a decision on March 26, 1958, granting the defendants' motion to dismiss Information C 155–43, it is

Ordered, that Information C 155–43 be dismissed.

Dated: New York, N.Y., April 29, 1958.

G. F. NOONAN,
U.S.D.J.

20a In United States District Court, Southern District of New York

UNITED STATES OF AMERICA

against

BERNARD MERSKY, IRVING WEINSTEIN AND MERSON MUSICAL PRODUCTS CORP., DEFENDANTS

Notice of appeal from order

SIR:

NAME OF APPELLANT: United States of America.

NAME AND ADDRESS OF APPELLANT'S ATTORNEY: Paul W. Williams, United States Attorney for the Southern District of New York, United States Court House, Foley Square, Borough of Manhattan (7), City of New York.

OFFENSE: Removing country of origin labels from articles imported into the United States, Title 19, United States Code, Section 1304, and conspiring so to do, Title 18, United States Code, Section 371.

21a ORDER OF THE COURT: Order of Honorable Gregory F. Noonan entered in the Southern District of New York on April 29, 1958, granting a motion to dismiss Information C 155–43 on the ground that the Treasury Regulations promulgated under Title 19, United States Code, Section 1304, are not sufficiently clear and unambiguous as to justify Criminal prosecution thereon.

The United States of America hereby appeals to the United States Court of Appeals for the Second Circuit from the above-stated order.

Dated: New York, N.Y., April 30, 1958.

Yours, etc.,

Paul W. Williams,
PAUL W. WILLIAMS,
United States Attorney for the Southern District of New York, Attorney for United States of America, Office and Post Office Address: United States Court House, Foley Square, Borough of Manhattan (7), City of New York.

To: JULIUS L. SCHAPIRA, Esq.,
342 Madison Avenue,
New York 17, New York.

22a In United States Court of Appeals for the Second Circuit

No. 96. October Term, 1958

(Argued October 7, 1958)

Docket No. 25193

UNITED STATES OF AMERICA, APPELLANT

v.

BERNARD MERSKY, IRVING WEINSTEIN, AND MERSON MUSICAL PRODUCTS CORP., APPELLEES

Before CLARK, Chief Judge, MEDINA and LUMBARD, Circuit Judges

Opinion

Decided November 6, 1958

Appeal from the dismissal by the District Court for the Southern District of New York, Noonan, *J.*, of an information charging the defendants with violation of 19 U.S.C. § 1304(e), 46 Stat. 687, as amended, 52 Stat. 1077 (1938), governing the alteration of the markings on imported articles required by 19 U.S.C. § 1304(a), 46 Stat. 687, as amended, 52 Stat. 1077 (1938), and its implementing regulations. If the government so requests the appeal will be certified to the Supreme Court which has exclusive jurisdiction of it under the Criminal Appeals Act, 18 U.S.C. § 3731 (1952); otherwise it will be dismissed.

23a HERBERT C. KANTOR,
Assistant United States Attorney, Southern District of New York, New York, N.Y. (Arthur H. Christy, United States Attorney and George I. Gordon, Assistant United States Attorney, on the brief), for appellant.

JULIUS L. SCHAPIRA,
New York, N.Y., for appellees.

LUMBARD, *Circuit Judge:*

We must refuse to hear the government's appeal from the district court's dismissal before trial of an information charging the defendants with improperly removing the labels on goods imported from the Soviet Zone of Germany, because

it seems to us that the appeal may be taken only to the Supreme Court by reason of 18 U.S.C. § 3731 (1952). Accordingly, under the terms of the statute, and following our precedent in United States v. Zisblatt, 172 F. 2d 740 (2 Cir. 1949), we will certify the case to the Supreme Court if the government so requests.

Section 3731 provides that the government may appeal directly to the Supreme Court in two classes of criminal cases which are here relevant:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

* * * * *

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

24a Where appeal may be taken to the Supreme Court the same statute expressly provides that it may not be taken to a court of appeals:

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof *except where a direct appeal to the Supreme Court of the United States is provided by this section.*" [Emphasis added.]

Our conclusion from § 3731 that the government's appeal here lies only to the Supreme Court rests on two grounds. The first is that, as the district court's dismissal of the information rests on its interpretation of a regulation, it is tantamount to being "based upon the invalidity or construction of the statute upon which the * * * information is founded," and appeals from such dismissals may be taken only to the Supreme Court. The second ground is that the effect of Judge Noonan's decision was to sustain a "motion in bar" and that the express provisions of the controlling statute therefore take the appeal to the Supreme Court.

The first ten counts of the eleven count information charge violations of 19 U.S.C. § 1304(e), 46 Stat. 687, as amended, 52

Stat. 1077 (1938) [1] by the unlawful alteration, between August 1956 and March 1957 of the required country of origin markings on ten violins. The eleventh count charges con-
25a spiracy to violate the same subsection. The defendants moved to dismiss the information for failure to state facts sufficient to constitute an offense against the United States.

Section 1304(e) forbids wilful alterations, for the purpose of concealment, of the marking of the "country of origin" on imported articles required in subsection 1304(a).[2] Subparts (1) and (2) of that subsection vest in the Secretary of the Treasury the power to issue regulations to designate acceptable markings, and to require the addition of words "to prevent deception or mistake as to the origin of the article * * *" Pursuant to this power, the Secretary issued three Treasury Decisions. The first, T.D. 51527 (August 28, 1946), provided that imported articles from any of the Allied Zones of occupied Germany could properly be marked "Germany." The second, T.D. 53210 (March 3, 1953), superseded T.D. 51527 and required that articles from the Soviet Zone be so marked, but the defendants urge that T.D. 51527 was superseded for the purpose of customs valuation only, rather than for all purposes. The third, T.D. 53281 (June 18, 1953), is relied on by the government to establish that T.D. 51527 had been superseded for all purposes.

The information alleged that in wilful violation of § 1304 (e) the defendants, who bought from importers and sold to retailers, removed the "Germany/USSR Occupied" label from the violins; defendants' affidavit apparently admits that they customarily substituted the label "Made in Germany." Judge Noonan's dismissal of the information appears to have rested on two alternative grounds both of which the govern-
26a ment questions on appeal: Judge Noonan held that either the regulations, properly construed, do not render

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[1] Section 1304(e)—If any person shall, with intent to conceal the information given thereby or contained therein, deface, destroy, remove, alter, cover, obscure, or obliterate any mark required under the provisions of this chapter, he shall, upon conviction, be fined not more than $5,000 or imprisoned not more than one year, or both.

[2] Section 1304(a)— * * * every article of foreign origin * * * imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article * * * will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article. * * *

illegal the defendants' alterations of the markings, or, alternatively, if the alterations were rendered criminal, the regulations are too vague to sustain a criminal prosecution.

First, it seems to us that the dismissal of an information based upon a regulation, or regulations, is comprehended within the scope of the words "construction of the statute upon which the * * * information is founded." It is true that there has been no previous ruling on the precise question presented here: Whether appeal from a dismissal is exclusively for the Supreme Court when it is based in the alternative upon a holding that the regulation as construed is inapplicable, or upon a construction which renders it too vague to sustain the imposition of criminal sanctions. But in United States v. Foster, 233 U.S. 515 (1914), the Supreme Court accepted jurisdiction because the district court had dismissed an indictment—based in part on a regulation of the Postmaster General—on the ground that the regulation was directly in conflict with what it held to be the proper "construction of the statute" involved. We see no reason to distinguish such dismissals from those in which the court looked to what some officer of the government has done under authority which Congress expressly delegated in order to make possible the enforcement of a statute, and not to what Congress itself has written.

Regarding such statutes and regulations there is usually no difference in the penalties which are imposed. The government's need for an authoritative ruling from the highest court may, and usually would, be equally as pressing, and it was to provide such ruling that the Act was passed.[3] See Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States § 176 (Wolfson & Kurland ed. 1951). In short, when Congress used the term "statute" in § 3731 it did so in the broad sense and meant to include all that

27a

[3] It is no answer that the court of appeals could provide the government with such a ruling where only a regulation is in question. If an appeal such as this would ever have been within the Supreme Court's exclusive jurisdiction it is now, since that Court's jurisdiction remained undiminished when jurisdiction over matters not appealable to it was first vested in the courts of appeals in 1942. Compare 34 Stat. 1246 (1907), with 56 Stat. 271 (1942); see H. Rept. 2052, April 28, 1942, 77th Cong., 2d Sess. Before 1942 to have held that there was a distinction between statute and regulation for purposes of appeal would have made dismissals based on the latter wholly unappealable, and would have defeated the remedial purpose of the statute.

could have the force of law from the exercise of the power which Congress may have granted as part of the statutory scheme.

Moreover, since a dismissal based upon a holding that the regulations will not support a prosecution necessarily decides as well that the statute alone, without the regulations, will not support it, insistence upon a distinction between statute and regulation for purposes of appeal would force the government to elect whether to appeal the construction of the regulations to the court of appeals, or whether to appeal the construction of the statute to the Supreme Court. The alternative to such an election would be the simultaneous prosecution of appeals in both courts. We cannot find that the Congress intended to limit the remedial usefulness of the statute by such an unworkable distinction in the absence of an express purpose to do so.

In any event, Judge Noonan's dismissal of the information amounts to "sustaining a motion in bar." Of course we look to the substance of the defendants' motion and what it sought to accomplish rather than its mere form. See e.g., United States v. Thompson, 251 U.S. 407, 412 (1920); United States v. Oppenheimer, 242 U.S. 85, 86 (1916); United States v. Barber, 219 U.S. 72, 78 (1911). If to sustain the motion will "end the cause and exculpate the defendants" then the motion is "in bar." United States v. Hark, 320 U.S. 531, 536 (1944); see also United States v. Oppenheimer, supra, at 87–88. As the defendants have not been put in jeopardy, and since, on either of the grounds given by Judge Noonan for the dismissal, the defendants will be exculpated if the district court decision stands, the appeal is from a decision which in effect sustained a motion in bar and only the Supreme Court may hear it.

28a

For these reasons the appeal will be certified to the Supreme Court if within thirty days the government requests that we do so; otherwise the appeal will be dismissed.

29a In United States Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

BERNARD MERSKY, IRVING WEINSTEIN, AND MERSON MUSICAL PRODUCTS CORPORATION, DEFENDANT-APPELLEES

Judgment

November 16, 1958

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the case will be certified to the Supreme Court of the United States if within thirty (30) days the government so requests; otherwise the appeal will be dismissed, in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk.

30a [File endorsement omitted.]

31a In the United States Court of Appeals for the Second Circuit

No. 96—October Term 1958

Docket No. 25193

UNITED STATES OF AMERICA

v.

BERNARD MERSKY, IRVING WEINSTEIN, AND MERSON MUSICAL PRODUCTS CORP.

Memorandum for the United States with respect to certification of the appeal to the Supreme Court

Filed December 4, 1958

In its decision of November 6, 1958, the Court stated that "the appeal will be certified to the Supreme Court if within

thirty days the government requests that we do so; otherwise the appeal will be dismissed." It is respectfully suggested that the transfer should be on the court's own motion rather than on the request of the government since 18 U.S.C. 3731, under which the appeal was taken to this Court, provides:

"If an appeal shall be taken pursuant to this section to any court of appeals, which in the opinion of such court, should have been taken directly to the Supreme Court of the United States, *such court shall certify the case to the Supreme Court of the United States* * * *."

The reason that the government makes this suggestion, rather than a request that the appeal be certified in accordance with the decision, is that it does not believe that, as appellant, it can acquiesce in the decision of the Court that the appeal should have been taken to the Supreme Court in the first instance. The question of the court which should review a decision dismissing an indictment, based on a construction of regulations issued under a statute, is, we
32a believe, an important one which merits consideration by the Supreme Court. We recognize that it has not been squarely decided by the Supreme Court whether or not the dismissal of an indictment or information founded upon an administrative regulation is appealable directly to the Supreme Court under 18 U.S.C. 3731, where the dismissal is based on an interpretation of the regulation. Nonetheless, we think the appeal lies to the Court of Appeals in such a case. And, since the government is of the view that the appeal was properly taken to this Court, it does not believe that it would be proper to give the appearance of acquiescence in the Court's decision to the contrary, by itself requesting the certification of the case.

In our view the avenue of direct appeal to the Supreme Court is limited to those cases where the district court has squarely and clearly construed an act of Congress. No one doubts but that administrative regulations have the force of law. It yet remains true that they are not clothed with the solemnity and dignity of a statute, they do not rise to the level of the product of the Senate and House of Representatives. We think that, under the statute, they have not been made the concern of the Supreme Court until after consideration by a Court of Appeals.

The provision in the Criminal Appeals Act for direct appeals to the Supreme Court has been consistently construed by it "to

mean that review can be had here only if a district court's decision was based exclusively upon the invalidity or construction of a statute." United States v. Petrillo, coucurring opinion of Frankfurter, J., 332 U.S. 1, 14, citing United States v. Hastings, 296 U.S. 188, 192, 194; United States v. Borden Co., 308 U.S. 188, 193; United States v. Swift & Co., 318 U.S. 442. See also United States v. Jones, 345 U.S. 377; United States v. Wayne Pump Co., 317 U.S. 200, 208. Moreover, the statute has always been narrowly construed to deny Supreme Court
33a jurisdiction where reasonably possible to do so. "The Government's appeal does not open the whole case." United States v. Borden Co., supra. See also United States v. Hastings, 295 U.S. 188, 192; United States v. Kissel, 218 U.S. 601, 606–607; United States v. Keitel, 211 U.S. 370, 397–399. We therefore do not believe that a regulation can be equated to a statute for the purposes of the Criminal Appeals Act. Other circuit courts have taken jurisdiction of appeals involving the construction and validity of regulations. United States v. Goldberg, et al., 225 F. 2d 180 (C.A. 8), certiorari denied, sub nom. Wisniewski v. United States, 353 U.S. 901; United States v. Gray, 207 F. 2d 237 (C.A. 9).

Where, as in United States v. Foster, 233 U.S. 515, there is a question as to whether the regulation is authorized by statute, a decision that it is not so authorized involves a construction of the statute itself, and falls within the rationale of the Criminal Appeals Act that the validity or construction of an act of Congress should go directly to the Supreme Court for review. But here the issues raised do not impinge upon the statute which Congress has passed; they involve only an interpretation of what the administrative authorities have required, the validity only of the regulation, not of the statute.

As to whether or not the dismissal of the information amounted to the grant of a "motion in bar", we do not believe that every motion which will terminate the case and exculpate the defendant is a "motion in bar". We think that this term, as used in the statute, is a term of art, having a meaning established by long practice. United States v. Hark, 320 U.S. 531, which holds that a motion to quash may be treated as a "special plea in bar" for the purpose of direct appeal by the government also shows that the terminology used in the present Criminal Appeals Act, 18 U.S.C. 3731, "motion in bar"

34a is directly traceable to earlier phraseology ("special plea in bar") which has had a fixed meaning for centuries. The revisor's notes do not suggest any Congressional intent to change that meaning. Not all orders made before a defendant is put in jeopardy and which effectively terminates a criminal prosecution are appealable as "final" orders. Carroll v. United States, 354 U.S. 394. Similarly, not all motions which, if granted, would have the practical effect of barring trial, are motions or pleas "in bar".

In short, we think the decision presents an important issue under the Criminal Appeals Act which should be decided by the Supreme Court, and which, under the Criminal Appeals Act, should come before the Supreme Court by reason of the action by this Court itself in certifying the cause as required by 18 U.S.C. 3731.

Respectfully submitted.

ARTHUR H. CHRISTY,
United States Attorney.

35a [File endorsement omitted.]

36a In United States Court of Appeals for the Second Circuit

No. 96, October Term 1958, Docket No. 25193. (Cause certified December 8, 1958)

UNITED STATES OF AMERICA, APPELLANT

v.

BERNARD MERSKY, IRVING WEINSTEIN, AND MERSON MUSICAL PRODUCTS CORP., APPELLEES

Before CLARK, Chief Judge, MEDINA and LUMBARD, Circuit Judges

Order re certification

December 8, 1958

Appeal from the District Court of the United States for the Southern District of New York.

This cause having come on to be heard upon an appeal taken herein by the United States of America and it appearing to the

court that the said appeal, pursuant to the provisions of Title 18, Section 3731, United States Code, should have been taken directly to the Supreme Court of the United States,

And the government having requested certification of the appeal to the Supreme Court of the United States subsequent to the filing of our opinion on November 6, 1958,

Now therefore, this court hereby certifies this case to the said Supreme Court.

CHARLES E. CLARK,
HAROLD R. MEDINA,
J. EDWARD LUMBARD,
U.S.C. JJ.

Dated: New York, N.Y., December 8, 1958.

37a [File endorsement omitted.]

38a United States of America, Southern District of New York

I, A. Daniel Fusaro, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1a to 37a, inclusive, contain a true and complete transcript of the printed portions of the record and proceedings had in said Court, in the case of United States of America, Plaintiff-Appellant against Bernard Mersky, Irving Weinstein, and Merson Musical Products Corporation, Defendants-Appellees, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this twenty-third day of January in the year of our Lord one thousand nine hundred and fifty-nine, and of the Independence of the said United States the one hundred and eighty-third.

A. DANIEL FUSARO,
Clerk.

39a Supreme Court of the United States

No. 700, OCTOBER TERM, 1958

[Title omitted.]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Order postponing jurisdiction

March 30, 1959

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits and the case is transferred to the summary calendar.

March 30, 1959.

U. S. GOVERNMENT PRINTING OFFICE 1959